United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-1011

pls

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

UNITED STATES OF AMERICA,

- against -

PATRICK RAYLL,

Appellant-Defendant.

Docket #74-1011

APPELLANT RAYLL'S BRIEF

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UNITED STATES COURT OF APPEALS
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APPELLANT RAYLL'S BRIEF

Appellant Patrick Rayll appeals to this Court the judgment of conviction entered against him after a jury trial presided by District Judge Orrin Judd (#73 CR 244-EDNY). 1a.

Rayll was convicted along with three co-defendants on a one count indictment charging possession of stolen goods which had been moving in interstate commerce. 18 USC 2315. He received a sentence of four years, pursuant to 18 USC 4208 (a) (2), and has been admitted to bail pending appeal. Both at the trial and on the appeal the author of this brief has been his court assigned counsel.

INDICTMENT (2a)

The one count indictment charges:

> "On or about August, 1972, in the Eastern District of New York, the defendants,

THOMAS BUTTAFUCCO, JESSIE PEARSON ANTHONY POLITO and PATRICK RAYLL, together with Ira Kirschner, not named as a defendant herein, wilfully and unlawfully received and concealed a quantity of stolen Colgate-Palmolive articles, of a value of approximately One Hundred and Ten Thousand Dollars ($110,000,00.), which articles were moving as a part of and constituted interstate commerce from Elizabeth, New Jersey to Plainview, New York, knowing the same to have been stolen. (Title 18 United States Code, Section 2315 and Section 2).

STATUTES INVOLVED

18 USC 2315 prohibits the possession, receipt and concealment of stolen goods, which had been moving in interstate commerce. This appeal does not involve any question of statutory construction.

THE GOVERNMENT'S CASE

On August 21, 1972, federal agents, armed with a search warrant, raided the warehouse of Ira Kirschner, at 41 Cain Drive, Plainview, Long Island. The agents seized countless cartons of toilet articles, and arrested Kirschner. R. 179, 303-304. Kirschner advised the agents and the United States Attorney that his partners were Patrick Rayll and the three other co-defendants, who had brought the contraband to his warehouse just three days earlier. In return for his testimony at the trial, Kirschner received complete immunity -

transactional immunity - from the federal prosecutor. R. 114. fn. 1

At the trial there was no real dispute that the goods in question had been stolen; the articles had been moved in interstate commerce; and the cartons were valued in excess of five thousand dollars. R. 336.

The trial focused solely on the testimony of Kirschner that Rayll and the defendants had arranged to bring the stolen toilet articles to Kirschner's warehouse. Kirschner's credibility was the sole issue for the jury to resolve, for the government had little or no corroboration. The agents did not observe Rayll or the others at the warehouse, or at any other place in possession or in the presence of the cartons. R. 331-332. Nor did any witnesses corroborate Kirschner's testimony. None of the defendants gave any admissions or confessions, nor was anything seized from any of them at the time of arrest.

In his testimony Kirschner fully admitted his own participation in this transaction. R. 121 seq. He conceded he was given complete immunity in this matter. Nor did he have any other legal

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fn. 1 In view of the fact that Kirschner was caught red-handed in possession of stolen goods, it is difficult to understand why the government gave transactional, rather than testimonial, immunity to Kirschner.

cases pending to which he could plead. This was his only problem, and he escaped prosecution.

As such the trial presented a sharp and keenly contested issue of credibility for the jury's resolution. As Rayll did not testify, or call any witnesses (R. 525), only the issue of Kirschner's credibility was presented to the jury in its consideration of the government's case against Rayll. fn. 2

Over defense objection the prosecution was allowed to bolster the credibility of its key witness Kirschner, when it introduced into evidence, and read to the jury, a letter which the prosecution itself had written to "To whom it may concern", and given to Kirschner prior to his appearance before the grand jury. R. 113- 120; exhibit 1. In the letter the assistant United States Attorney (who was trial counsel for the government) wrote (8a):

> "We have agreed not to prosecute Kirschner for the crimes arising from these events. He has agreed to testify truthfully and completely concerning the persons and incidents which constituted his involvement with the case."

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fn. 2 The other defendants had testified, and of course had put the issue of their own credibility before the jury as to the government's case against each of them.

THE DEFENSE

Rayll did not testify, nor did he call any witnesses. In summation his counsel argued to the jury that the testimony of Kirschner just was not credible; it was not corroborated; and Kirschner had every motive to shift responsibility to others to minimize his own legal problems.

POINT ONE

THE GOVERNMENT WAS IMPROPERLY ALLOWED TO VOUCH FOR THE CREDIBILITY OF ITS KEY WITNESS IRA KIRSCHNER BY INTRODUCING INTO EVIDENCE ITS OWN SELF-SERVING LETTER.

Ira Kirschner was the government's only witness as to any of the wrongs done by the defendants on trial. Kirschner had been caught with stolen goods in his own warehouse. In spite of that predicament, he bargained and secured his complete immunity from prosecution. Kirschner testified has was granted immunity by the government. R. 114-115. That fact was never in dispute, nor doubted by the defense.

As expected Kirschner's credibility was the sole issue for the

jury's resolution. No other witness testified to any acts of the appellants. There just was no corroboration of Kirschner's testimony. There was no evidence of any admission or confession. Nor was anything seized from Rayll at the time of his arrest some three weeks later. None of the FBI agents observed Rayll, or any of the other defendants, in any aspects of the transaction.

Rayll was the only defendant not to have testified. Nor did he call any witnesses. As such he never put into issue his credibility, or that of any witness. As to the government's case against him, the sole issue remained that of the credibility of Ira Kirschner.

Over defense objections (3a, 4a, 5a, 6a, 7a, 8a, 9a, 10a), the prosecution was allowed to introduce into evidence a letter (Exhibit 1) which it had written to Ira Kirschner regarding its grant of immunity to him. 3a-10a. The letter, written by the government's trial counsel, stated (8a-9a):

> "To Whom It May Concern:
>
> "On August 31, 1972, the FBI seized a large quantity of stolen Colgate-Palmolive articles at IMK Sales Corporation, 41 Kane Drive, Plainview, New York. Ira Kirschner is the President of the corporation. He has agreed to testify truthfully and completely concerning the persons and incidents which constituted his involvement with the case. We have agreed not to prosecute Kirschner for the crimes arising from these events. The immunity does not exclude immunity for prosecution for perjury, should

Kirschner's testimony be untrue or incomplete. Very truly yours, Robert A. Morse, United States Attorney, by Peter R. Schlam, Assistant U. S. Attorney." (emphasis added)

The prosecutor carefully read the letter to the jury, including his own name (Peter Schlam). 8a-9a.

By doing so the government advised the jury it believed Ira Kirschner was testifying truthfully, and that it had granted him immunity because of its full confidence in his credibility. The government advised the jury it would prosecute Ira Kirschner for perjury only if it disbelieved him. However, as expected, Ira Kirschner was not indicted for perjury, and so the jury was never led to doubt the government's belief in his credibility. By this letter the government trial counsel told the jury it was vouching for its witness' credibility.

Obviously the impact of such a letter is just as profound as if Peter Schlam had testified at the trial. However the prosecutor could not be cross-examined for he carefully did not take the witness stand. By writing this letter the prosecutor put his own credibility on the line. By his own words he placed his own views before the jury.

Of course the prosecution was really just manufacturing evidence of credibility. Government trial counsel drafted the letter to its own key witness, and then offered the letter into evidence.

Let us suppose defense counsel wrote a letter to a defendant before he took the stand to testify. Let us reconstruct such a letter - "I am allowing you to testify provided you testify truthfully and completely. If you testify falsely, I shall so advise the United States Attorney and the grand jury. Signed - Your defense counsel." Now the defense offers that letter into evidence - can we imagine it being received by the trial court? Of course not! It is merely manufactured evidence, expressing the views of trial counsel. It places the credibility of defense counsel before the jury - a matter of no concern to the jury. fn. 3

In United States v. Puco, 436 F2d 761, 762 (CA-2, 1971), this Court reversed a narcotic conviction of Puco because the prosecutor had placed his own credibility in issue by the manner in which he had cross-examined co-defendant Gonzales as to a prior interview at the prosecutor's office:

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fn. 3 Colloquy between defense counsel and district court (6a):

> " MR. WALES: Its hearsay. I can write all the letters in the world, your Honor. He writes a letter that the witness is truthful. I can write a letter saying that Pat Rayll is truthful.
> THE COURT: You know that's different. I'll receive the letter."

"Did you tell me...?
"Do you recall me asking you...?

In reversing this Court wrote (436 F2d at 762):

> "We find this contention of appellant that prejudicial error was injected here well taken. Using this statement which was never admitted into evidence against either defendant, in this way in effect placed the credibility of the prosecutor himself before the jury and was therefore highly prejudicial. The prosecutor by his reading from the purported statements and the form of his questions was plainly representing that Gonzales had in fact made the statements to him. This practice has been widely condemned as this court noted in a factual situation very similar to the present case. United States v. Block, 88 F. 2d 618, 620 (2d Cir. 1937):
>
> > The judge's charge to the jury mended nothing; he left the jury to disentangle in their minds the innocuous part which the witness had conceded from the great bulk which he had disaffirmed*** the natural conclusion was not only that defendants (were guilty of the crimes charged) but that they had suborned the witness to deny it.
>
> (See also, Greenberg v. United States, 280 F. 2d 472, 474-475 (1 Cir. 1960); Dunn v. United States, 307 F. 2d 883, 885 (5 Cir. 1962)."

In a close factual case, where the government's case rests upon uncorroborated accomplice testimony, this Court does scrutinize trial errors with particular care. United States v. Persico, 305 F. 2d 534, 536 (CA-2, 1962). "Error which may be deemed relatively minor in other circumstances may reach prejudicial proportions in a close factual

case such as this." United States v. Grumberg, 431 F.2d 1062, 1066 (CA-2, 1970).

CONCLUSION

The judgment should be reversed.

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March 1974

C 321—Affidavit of Service by Mail.
Affirmation of Service by Mail on Reverse Side.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff* against PATRICK RAYLL, *Defendant*	*Index No.* Docket #74-1011 *AFFIDAVIT OF SERVICE BY MAIL*

STATE OF NEW YORK, COUNTY OF New York *ss.:*

The undersigned being duly sworn, deposes and says:

Deponent is not a party to the action, is over 18 years of age and resides at Queens, New York

That on the 7th *day of* March *1974 deponent served the annexed* Brief and appendix

on United States Attorney

attorney(s) for government

in this action at United States Courthouse, 225 Cadman Plaza East, Brooklyn, N.Y. 11201

the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in — a post office — official depository under the exclusive care and custody of the United States post office department within the State of New York.

Sworn to before me
this 7th *day of* March *19*74

H. ELLIOT WALES
NOTARY PUBLIC, STATE OF NEW YORK
No. 24-4129915
Qualified in Kings County
Commission Expires March 31, 1975

Lillian Kurtzer

The name signed must be printed beneath